No. 190.

Brief of Hall for U. S.

FILED
JAN 3 1899
JAMES H. McKENNEY
Clerk

Filed Jan. 3, 1899.

No. 1852.

In the Supreme Court of the United States.

UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

ONE DISTILLERY, ET ALIA, AND HENRY WOLTERS, WILLIAM HELM, R. H. AUSTIN AND J. H. COFFMAN, CLAIMANTS OF SAID ONE DISTILLERY, ET ALIA.

In Error to the Circuit Court of the United States for the Southern District of California.

Brief for Claimants.

FREDERIC W. HALL,
Attorney for Claimants,
San Francisco, Cal.

Filed this ..... day of ..... 1899.

..... *Clerk.*

By .....

Deputy Clerk.

IN THE

Supreme Court of the United States.

UNITED STATES OF AMERICA,
Plaintiff in Error,

VS.

ONE DISTILLERY, ET ALIA, AND HENRY WOLTERS, WILLIAM HELM, R. H. AUSTIN AND J. H. COFFMAN, CLAIMANTS OF SAID ONE DISTILLERY ET ALIA.

No. 16,712.

In Error to the Circuit Court of the United States for the Southern District of California.

Brief for Claimants.

STATEMENT OF CASE.

This is an action to condemn a certain distillery and distillery property and have them declared forfeited to the Government on account of certain alleged frauds against the Internal Revenue Law.

The Fruitvale Wine & Fruit Company, a corporation, was, during the year 1887 and up to June 9th, 1888, the owner of a certain distillery and distillery property situated near the City of Fresno, State of California. The distillery was operated by that corporation from June 1887 up to the end of that year. During all of that time, W. More Young was the secretary, the managing director and one of the principal owners in the corporation and was in charge of the distillery business.

The claimants in this action were small stockholders in that corporation but had nothing to do with its management and had no actual knowledge of any of the frauds or acts mentioned in this proceeding.

Early in 1888 and before any trouble arose with the Government, the Fruitvale Wine & Fruit Company became insolvent, and all its property, including the distillery, was sold at public auction on June 9th, 1888, and was purchased by the claimants for Seven Thousand Seven Hundred ($7,700) Dollars. The claimants thereupon took possession of the property and thereafter conducted the distillery business themselves as partners.

On the 20th day of June 1888, the distillery and distillery property were seized by the Collector of Internal Revenue on account of certain frauds, concealments and removals of distilled spirits, and other fraudulent acts alleged to have been committed by the Fruitvale Wine & Fruit Company during the latter part of the year 1887, while that corporation was the owner and in possession and carrying on the business. The property seized was on said seizure appraised at Seven Thousand Two Hundred ($7,200) Dollars. Afterwards, the property was released to claimants, who then improved and added to it.

On or about November 2nd, 1888, the distillery and distillery property, with all the property added to it by the claimants, all appraised at $35,000, were again seized by the Collector of Internal Revenue for the same frauds, concealments, removals of distilled spirits, and other fraudulent acts alleged to have been committed by the Fruitvale Wine & Fruit Company in the latter part of 1887 above mentioned.

On this last seizure made on or about November 2nd, 1888, the present forfeiture proceeding is brought under Sections 3257, 3281, 3305, 3453 and 3456 of the Revised Statutes. Claimants gave bond and the property was released to them on or about November 28th, 1888.

On December 8th, 1888, the property was again seized by the collector for the unpaid taxes, out of which it was alleged the Government had been defrauded by the Fruitvale Wine & Fruit Company in the latter part of 1887 by means of the above frauds. The claimants, in order to recover said property, paid to the Government the sum of Three Thousand Three Hundred and Ninety-two ($3,392) Dollars, the amount at which the Collector then assessed the unpaid taxes, and the property was again released to the claimants.

Thereafter, on December 20th, 1888, the said W. More Young, who was a large stockholder and managing director, secretary and book-keeper of the Fruitvale Wine & Fruit Company during all of the year 1887 and up to the time the property was sold to the claimants, and during the time the frauds are alleged to have been committed, was indicted, under Section 3451 of the Revised Statutes, for directly committing, as secretary of that corporation, certain illegal acts by means of which the frauds, concealments, removals and other fraudulent acts set out in the libel of information in this action were perpetrated; and on February 20th, 1889, he was convicted on one count of said indictment and sentenced to one year's imprisonment and acquitted on the remaining counts. (Transcript, p. 20-24.) (Transcript, p. 19, folio 37.)

The above facts and the trial and conviction and acquittal of W. More Young were by the claimants set up by their answer to said libel as a bar to the forfeiture proceedings in the District Court before Judge Ross. The amended answer contained these statements, to wit:

"That the alleged fraud, concealments, and removal of distilled spirits, and the other alleged fraudulent acts contained in said libel of information, are the same frauds, concealments and removals of distilled spirits and other alleged fraudulent acts inquired of and investigated upon the trial of said W. More Young hereinabove mentioned, and in respect of which he was convicted and acquitted in manner aforesaid.

"And these claimants further aver that all of the evidence which would be necessary to establish, and competent under, the various assignments and charges of fraud set out in plaintiff's libel of information herein, was used and introduced upon the trial of said Young; and that the various charges of fraud and causes of forfeiture alleged by plaintiffs herein relate to the same subject matter and are based on the same transactions as the various allegations in said indictment contained, and about which inquiry was made upon the trial of said Young; and that at the time when said bill of indictment was drawn by the then attorney for the United States, and found by the grand jury, and at all of the times it was considered by said attorney for the United States, all of the facts which would be competent to sustain the allegation of plaintiff's libel of information were known to and within the possession of the said attorney of the United States.

"And these claimants aver and say that the United States "ought not to maintain its action herein for the penalty de- "nounced by section 3451, and other sections of the Revised "Statutes of the United States under which the said libel of "information was drawn, for the said W. More Young was "tried and convicted in this court in manner aforesaid, as to "one of the counts of said indictment and acquitted as to other "counts, and the full sentence of the law and this court has "been executed upon him for the same matters and things "herein alleged in plaintiff's said libel of information; and "that all and singular of said matters upon said trial were "tried and inquired into and fully heard, and on the hearing "thereof the jury, duly impaneled and sworn, found said W. "More Young guilty as to part and not guilty as to other of "said charges" (Transcript, pages 19, 20, folios 38, 39).

The first count in the libel alleges that the barrels containing proof brandy and high proof spirits, seized by the Government, were found on or about the 1st day of June 1887 in the possession, custody and control of the Fruitvale Wine & Fruit Company for the purpose of being sold and removed by that Company in fraud of the revenue laws (Transcript, page 11, latter part of folio 22). This is specifically denied by claimants, who allege in their answer that they did not purchase from the Fruitvale Wine and Fruit Company any of the brandy or alcohol or high proof spirits or any of the barrels containing the same, seized by the Government, and none of said property last mentioned was ever in the possession of that Company (Transcript, page 16, allegation IX of answer).

The Government demurred to the answer and amendment to answer on the ground that they were not sufficient to constitute a defence.

The demurrer was overruled and on the trial the Government *admitted the allegations of the answer and amendment to be true* and submitted the case upon the pleadings, and the libel was thereupon dismissed by the District Court (Transcript, p. 25, folio 50).

The opinion of the District Court was given at length and is set out in the transcript on pages 26 to 33 inclusive.

From the District Court, the United States by writ of error took the case to the Circuit Court where the decision of the lower court was affirmed. From the Circuit Court the United States has again taken the case by writ of error to this Court.

Since the trial in the District Court certain other proceedings have been taken by the Government in connection with

this matter, which of necessity do not appear in the record; but they have been admitted by the Government on all previous arguments and we presume will be admitted on this argument.

The proceedings were these:

Subsequently to the seizures, payments and proceedings above set out, the United States claimed that the unpaid taxes out of which it had been defrauded by the Fruitvale Wine & Fruit Company in 1887 amounted to more than the $3392.00 paid by claimants on the seizure of December 8th, 1888.

The Government thereupon brought suit against the claimants alone as former stockholders in that Company for all the unpaid taxes of the Fruitvale Wine & Fruit Company, and in December 1891 judgment was recovered against the claimants for $15,712.60 in addition to the sums already paid by them, and this amount they have also been compelled to pay although they were hardly more than nominal stockholders in that corporation and had no knowledge of, and were not parties to, the fraud. Yet under the rule laid down in that case (U. S. vs. Wolters, 46 Fed. Rep., 509), they have been compelled to pay the taxes of the entire company. So it has practically amounted to another seizure of their property.

So these claimants have been compelled to bear all the burdens of the Fruitvale Wine & Fruit Company, and have been compelled to pay all the taxes claimed to be due from it amounting to $19,104.60, and have suffered three seizures of their property with the attendant damage to business already, all on account of the sins of the former owner of a small part of the property seized.

The Government has recovered from the claimants all the taxes due it from the Fruitvale Wine & Fruit Company with costs; has subjected them to three seizures; has sent W. More Young who perpetrated the frauds to jail for a year; and is now seeking as additional punishment for those frauds, to have declared forfeited to it not merely the $7,700 worth of property purchased by claimants from the Fruitvale Wine & Fruit Company, but also the $27,300 worth of property added by the claimants.

We submit that the Government has done very well, even if it never gets the distillery.

Our claim is that the former proceedings are a bar to the forfeiture proceedings.

We claim that the taxes having been collected in separate suits, and nothing being due the Government, this action is

not civil in any sense but is strictly an action to inflict punishment and is therefore a criminal action.

And in particular, we claim that having by a term of imprisonment criminally punished W. More Young, who was one of the owners of the property at the time, for the frauds complained of, the Government cannot now in this independent action inflict a second punishment for the same frauds by declaring the distillery property formerly belonging to Young forfeited.

POINTS AND AUTHORITIES.

I.

W. More Young was at the time he committed the frauds complained of a stockholder in the Fruitvale Wine & Fruit Company.

In *U. S.* vs. *Wolters*, 46 Fed Rep. 509,

it was held that, so far as the United States is concerned, the stockholders in a distillery corporation have the same rights and are subject to the same liabilities as partners, or joint owners, each owning the entire property.

The stockholder is not, under the above decision, the mere owner of stock in a corporation which owns the property; but in his dealings with and relations towards the United States, he is a direct owner of the property of the corporation.

The rights and liabilities of Young towards the Government are therefore the same as though he owned the entire distillery property. Therefore the fact that W. More Young was at the time he perpetrated the frauds complained of a stockholder in the Fruitvale Wine & Fruit Company, gives him the right to set up his trial and conviction as a bar as though he was the sole owner of the distillery property at the time.

This right has passed to the claimants as the successors of Young and as the present owners of the property. If the Government has lost the right to have the property condemned as against Young, it has lost it as against his successors in interest. Whatever Young could plead in defense of his property his successors in the ownership of that property can plead.

If it be claimed that the forfeiture took place in 1887 at the time the frauds were committed, and that the sale to the claimants on June 9, 1888, is void for all purposes, the result will be the same.

Let us suppose all these proceedings are moved back to a time antidating that sale, and that Young and claimants still own the property, as they owned it then, as stockholders in the Fruitvale Wine & Fruit Company.

This proceeding is brought to forfeit the property. Young has been already punished criminally for the offense, and to take this property is to take his property and punish him twice. He can, therefore, as a person interested in the property plead once in jeopardy, and if sustained his property cannot be taken.

But the claimants are also stockholders as well as Young, and under the above decision each directly owns the entire distillery property as well as Young. The interests cannot be segregated. The property of claimants cannot be taken without taking that of Young. As the property of Young cannot be taken, none of it can be taken.

The claimants are claiming for the benefit of all interested parties in accordance with the admiralty practice by which this proceeding is governed.

Whatever right one of the joint owners has against third parties, that right each and all joint owners have against third parties.

The above points were admitted by the Government on the argument in the Circuit Court.

It is alleged in claimants' amendment to answer that the alleged frauds, concealments and removal of distilled spirits and the other alleged fraudulent acts contained in said libel of information are the same frauds, concealments and removals of distilled spirits and other fraudulent acts inquired of and investigated upon the trial of said Young and in respect of which he was convicted and acquitted, and that all the evidence which would be necessary to establish, and competent under the various assignments and charges of fraud set out in the libel, was used and introduced upon the trial of Young; the charges of fraud and causes of forfeiture alleged in the libel relate to the same subject-matter and are based on the same transactions as the various allegations in the Young indictment and about which inquiry was made on his trial.

All this is admitted by the Government. (Transcript, p. 25, folio 50.)

That is, it is admitted that the Government is seeking in this proceeding to have the property declared forfeited for the same offenses for which Young was tried and convicted or acquitted.

The question is presented as though Young, being the sole owner of the property, and having been theretofore indicted and tried for committing certain frauds on the Government, and having been convicted and punished by imprisonment for committing one of them and acquitted of the rest, was, as claimant, pleading his own prior conviction and acquittal as a bar in a proceeding by the Government to forfeit his property for the same fraudulent acts for which he had been theretofore tried and convicted or acquitted.

II.

This forfeiture proceeding is barred by the trial and conviction and acquittal of W. More Young. By this action to declare the property forfeited Young is placed twice in jeopardy.

It will be observed that the Government is not seeking to recover compensation by this proceeding for damages which it has sustained by the unlawful act, nor to recover anything claimed to be due it; for the unpaid taxes about which all the trouble arose have been recovered. This proceeding is solely for the purpose of inflicting a second punishment on a party who attempted to defraud the Government of taxes, by depriving him of his property by forfeiture, after having already imprisoned him for the same acts under an indictment.

Young has been once in jeopardy; and we claim that this proceeding to forfeit his property for the same acts for which he has been once tried, convicted, and punished or acquitted, is barred by that part of Article V. of the Amendments to the Constitution of the United States, which declares "nor shall "any person be subject, for the same offense, to be twice put "in jeopardy of life and limb."

That this clause of Article V. of the Amendments does not apply merely to cases where an attempt is made to try a person twice for any offense punishable by loss of life and limb, but applies to all cases where it is sought to *punish* a person twice for an *offense*, is well settled.

Story on the Constitution, Sec. 1787 (Third Edition), explains the clause as follows: "The meaning of it is, that a "party shall not be tried a second time for the same offense, "after he has once been convicted or acquitted of the offense

"charged by the verdict of a jury, and judgment has passed "thereon for or against him."

In ex parte Lange, 18 Wallace 163,

the Court says in construing the cause: "If there is anything "settled in the jurisprudence of England and America, it is "that no man can be twice lawfully punished for the same "offense. * * * There has never been any doubt of its en- "tire and complete protection of the party when a second pun- "ishment is proposed in the same Court, on the same facts, for "the same statutory offense." The same case cites with approval Bishop on Criminal Law, Secs. 990-991 (Fifth Edition), saying that this provision of the Constitution applies to both felonies and misdemeanors; and also Chitty (1 Cr. L., 452-462) who drops the words "life and limb" and declares that the pleas of prior conviction or acquittal "depend on the principle "that no man shall more than once be placed *in peril of legal* "*penalties* upon the same accusation."

Ex parte Lange continues: "If we reflect that at the time "this maxim came into existence, almost every offense was "punishable with death or other punishment touching the "person, and that these pleas are now held valid in felonies, "minor crimes, and misdemeanors alike, and on the difficulty "of deciding when a statute under modern systems does or "does not describe a felony when it defines and punishes an "offense, we shall see ample reason for holding that this prin- "ciple intended to be asserted by the constitutional provision "must be applied *to all cases where a second punishment is at-* "*tempted to be inflicted for the same offense by a judicial sentence.*" It is evident from the above that the plea of "once in jeopardy" may be interposed not merely in cases where the pleader's "life or limb" is in danger, but in all cases where it is sought to inflict any kind of a punishment on him.

It is also evident that the nature of the proceeding by which it is sought to inflict the second punishment is immaterial. The constitutional question is, "is it a proceeding which will "punish the same person twice for the same offense?" And it seems to us the 5th Amendment is a bar, if the proceeding *in rem* to have Young's property declared forfeited for an offense committed by him can be considered as actually *punishing him* for that offense.

By a fiction of law a proceeding *in rem* to forfeit the property used in connection with the commission of an offense has been considered a proceeding to punish the *property* as a guilty party, evidently based upon the old law of *deodands*. As long

ago as 1786 the Fifth Edition of Bacon's Abridgment closed its chapter on deodands by saying: "As this forfeiture "seemeth to have been originally founded rather in the super- "stition of an age of extreme ignorance, than in the principles "of sound reason and true policy, it hath not of late years met "with great countenance in Westminster Hall." Some progress ought to have been made since that time; and the fiction that declaring an inanimate thing forfeited to the Government punishes the thing, and not the thing's owner, ought in 1899 to be pretty well exploded.

In *Boyd, Claimant*, vs. *United States*, 166 U. S., 616, decided in 1885, this Court had under consideration a proceeding to forfeit property similar to the proceeding in this case. Section 5 of the Act of June 22, 1874, declares that "In "all suits and proceedings other than criminal arising under "any of the revenue laws," claimant may be compelled to produce his books in Court to be used by the Government as evidence, or the allegations of the Government as to the contents of the books shall be taken as confessed. Claimant had refused to produce his books, claiming that the proceeding *in rem* to forfeit the property was a *criminal action against him*, and he was protected by that part of Amendment 5 of the Constitution which declares that no person "shall be compelled in any "criminal case to be a witness against himself." It is evident that unless a proceeding *in rem* to forfeit property could be considered a criminal action—that is an action to punish for an offense—and unless the owner and claimant could be considered the real party defendant, and the evidence "against himself," then the plea could avail him nothing. For it is well settled that in all civil actions, whether in contract or in tort, the defendant can be compelled to be a witness against himself, and to produce his books to be used as evidence against himself. The 5th Amendment could not apply in case it was sought to recover damages or money due, but only in case it was sought to *punish* for an *offense*, for that only would be a criminal case. Neither could it apply unless the fiction that the forfeiture proceedings were against the property and merely punished it, was disregarded, and the proceeding was considered an action against the claimant to punish him for an offense by depriving him of his property if he was found guilty. The Court discusses the case at great length, reviews fully and carefully the half dozen cases in which the Act of June 22, 1874, had been sustained by the Circuit and District Courts, and holds that the proceeding *in rem* is practically a

criminal action to punish claimant for an offense, is a proceeding against him, and is within this prohibition of Amendment 5 of the Constitution. The Court starts out with stating that the law passed originally at the time of the civil war "at a "period of great national excitement, when the powers of the "Government were subjected to a severe strain to protect the "national existence," a remark which will apply to the sections of the Revised Statutes under which this forfeiture is sought; and which gives the cause and excuse for passing laws which overstepped constitutional provisions.

In discussing the question whether a forfeiture proceeding *in rem* is a criminal proceeding the Court says: "We are also "clearly of opinion that proceedings instituted for the purpose "of declaring the forfeiture of a man's property by reason of "offenses committed by him, though they may be civil in form, "are in their nature criminal. In this very case the ground "of forfeiture as declared in the Twelfth Section of the Act "of 1874, on which the information is based, consists of certain "acts of fraud committed against the public revenue in rela"tion to imported merchandise, which are made criminal by "Statute; and it is declared that the offender shall be fined "not exceeding $5000, nor less than $50, or be imprisoned not "exceeding two years or both; and in addition to such fine "such merchandise shall be forfeited. These are the penalties "affixed to the criminal acts; the forfeiture sought by this suit "being one of them. If an indictment had been presented "against the claimants, upon conviction the forfeiture of the "goods could have been included in the judgment. If the "Government prosecutor elects to waive an indictment and to "file a civil information against the claimants (that is, civil in "form) can he by this device take from the proceeding its "criminal aspect and deprive the claimants of their immuni"ties as citizens and extort from them a production of their "private papers, or as an alternative a confession of guilt? "This cannot be. The information, though technically a civil "proceeding, is in substance and effect a criminal one. As "showing the close relation between the civil and criminal "proceedings on the same statute in such cases, we may refer "to the recent case of Coffey vs. U. S., in which we decided that "an acquittal on a criminal information was a good plea in "bar to a civil information for the forfeiture of goods arising "upon the same acts. As, therefore, suits for penalties and "forfeiture incurred by the commission of offenses against the "law are of this quasi criminal nature, we think that they are

"within the reason of criminal proceedings for all the pur-
"poses of the Fourth Amendment of the Constitution, and of
"that portion of the Fifth Amendment which declares that no
"person shall be compelled in any criminal case to be a wit-
"ness against himself, and we are further of opinion that a
"compulsory production of the private books and papers of
"the owner of goods sought to be forfeited in such a suit is
"compelling him to be a witness against himself, within the
"meaning of the Fifth Amendment to the Constitution."

In overruling the cases which had held the act constitutional the Court in the same case says: "*In U. S.* vs. *Mason*, "Judge Blodgett took the distinction that in proceedings *in* "*rem* for a forfeiture the parties are not required by a proceed-"ing under the Act of 1874 to testify or furnish evidence "against themselves, because the suit is not against them but "against the property. But where the owner of the property "has been admitted as a claimant, we cannot see the force of "this distinction; nor can we assent to the proposition that "the proceeding is not, in effect, a proceeding against the "owner of the property, as well as against the goods; for it is "his breach of the laws which has to be proved to establish "the forfeiture, and it is his property which is sought to be "forfeited; and to require such an owner to produce his pri-"vate books and papers, in order to prove his breach of the "laws, and thus to establish the forfeiture of his property is "surely compelling him to furnish evidence against himself. "In the words of a great Judge (Vaughn C. J.), 'Goods, as "'goods, cannot offend, forfeit, unlade, pay duties, or the like, "'but men whose goods they are.'" And again: "The as-"sumption that the owner may be cited as a witness in a pro-"ceeding to forfeit his property seems to us gratuitous. It "begs the question at issue. A witness, as well as a party, is "protected by the law from being compelled to give evidence "that tends to criminate him or to subject his property to for-"feiture. But, as before said, although the owner of goods "sought to be forfeited by a proceeding *in rem*, is not the nom-"inal party, he is nevertheless the substantial party to the "suit; he certainly is so, after making claim and defense; and "*in a case like the present he is entitled to all the privileges* "*which appertain to a person who is prosecuted for a forfeiture* "*of his property by reason of committing a criminal offense.*"

The case of *Boyd* vs. *U. S.* has been cited with approval many times since it was rendered, and there has been no tendency to recede from the law as there declared. Under the reasoning

in that case no other conclusion can be reached but that the present forfeiture proceeding is an attempt to punish Young twice for the same offense, and that he can avail himself of the plea of once in jeopardy as a bar to this action.

To the same effect is:

Lees vs. *United States*, 150 U. S., 476.

This was an action to recover a penalty under the act of February 26, 1885, for importing aliens under contract to labor. The question was whether the defendant could be compelled to be a witness against himself in that case. The Supreme Court said he could not, and further stated that the action "though civil in form is criminal in its nature" and reaffirmed the above case of Boyd vs. U. S.

This position has been taken by able judges in the Circuit and District Courts.

In *U. S.* vs. *McKee*, 4 Dillon, 128,

Justice Miller, sitting in circuit with Judge Dillon, was called to pass upon a very similar case.

The defendant had been indicted, tried and convicted under Sec. 5440 of the Revised Statutes, for conspiring to defraud the Government of taxes. Civil suit was then brought against him under Sec. 3296 of the Revised Statutes to recover double the amount of the taxes as a *penalty* for the same fraudulent acts of which he had been previously convicted. The Revised Statutes do not say the two punishments are in the alternative, or that one is a bar to the other, but prescribe both penalties for the same acts as fully and completely as they can be given by separate sections of the Revised Statutes, and as fully and completely as they are prescribed in this case. The Court considered the only doubt was "whether the offense "in the two proceedings was the same," and said: "For if it "is the same offense, as defined by law, for which he is now "prosecuted, and is also for the same transactions, our laws "forbid that he or any one else shall be twice punished for the "same crime or misdemeanor." And again: "We are, there-"fore, of opinion that if the specific acts of removal on which "this suit is brought are the same which were proved in the "indictment, the former judgment and conviction is a bar to "the present action." It was held that the prior conviction was a bar, and defendant's plea was sustained.

This case is cited with apparent approval in

Coffey vs. *U. S.*, 116 U. S., 445,

and in numerous cases in the Circuit and District Courts, none of which dispute the correctness of the rule there laid down.

The opinion of Judge Ross in the present case sustaining the plea in bar in the District Court for the Southern District of California, is found in 43 Federal Reporter, 846, and on pages 26 to 33 of the transcript. In his decision he states fully the law and the facts and considers the case carefully. Much of the decision is taken up with considering whether the claimants can set up the plea which Young could. The Court held they had the same rights as Young, and this point the Government conceded in the Circuit Court. As to the main point in issue Judge Ross says: "The Government had the right to "proceed by civil action to enforce the forfeiture of the prop- "erty because of the frauds, or to prosecute the parties en- "gaged in it criminally; but for the same acts it could not do "both, according to the ruling in the cases to which reference "has been made." And again: "To take the property in "which he (Young) has an interest is to take his property; and, "for the same acts and omissions, to punish him criminally "and also take his property is, for the same offenses, to punish "him twice."

In *U. S.* vs. *Gates* (5 Law Reporter, 46), an early case in the District Court of the U. S. Southern District, N. Y., set out in *In Re Leszynsky*, hereinafter mentioned, the Court held that a conviction and punishment by fine and imprisonment of the Captain of a ship for smuggling, under Section 19 of the Act of August 30, 1842 (5 U. S. Stat. at Large, 565), was a bar to a civil suit to recover from him the penalty of $400 prescribed for smuggling by Section 50 of the Act of March 2, 1799, (1 U. S. Stat. at Large, 665). The Court held, 1st: "That as the "United States had obtained judgment and inflicted punish- "ment on the defendant for an offense, they were prohibited "by general principles of law from prosecuting him again for "acts constituting the same offense; or, in other words, which "if proved would call for his conviction of that offense." 2nd: "That the punishment prescribed by the Act of 1842 was not "cumulative to that of 1799." Both Sections seem, however, to be in force; and there is nothing in the Act of 1842 declaring that it supersedes the Act of 1799, or that the two punishments are in the alternative.

Just what points the Government will make on this appeal we do not know at this time; but in reply to the above contention of claimants the United States in the Circuit Court urged two points: *First.* That the punishments by fine and impris-

onment and by forfeiture are one punishment for the offense, although two separate proceedings are required to enforce it, therefore Young is not twice in jeopardy. *Second.* That the title to the property sought to be forfeited, vested in the Government when the offense was committed and has never been divested.

To sustain the first point the Government in the Circuit Court relied upon In Re Leszynsky, 16 Blatchford, 9; U. S. vs. Three Copper Stills, 47 Fed. Rep., 497; U. S. vs. Oleson, 57 Fed. Rep., 579, and People vs. Stevens, 13 Wendell, 341.

The first case cited above, on which the Government mainly relied, was decided by Judge Blatchford in 1879 while Circuit Judge, and arose under Section 3318 R. S., which provides that if any rectifier of spirits shall not keep certain books required by law, he shall pay a penalty of $100, and shall, on conviction, be fined and imprisoned. Leszynsky had, after civil suit, paid the penalty of $100. Afterwards he was indicted under the same Section and pleaded the civil judgment as a bar.

The Court held: "Where the same Section of the Statutes "contains the description of the offense, and the prescription "of the penalty by civil suit, and of the punishment on a "criminal conviction, the two connected by the copulative "'and,' no other construction is proper than that the whole "is one punishment, and that the whole cannot be satisfied by "a part.

"Penalties and forfeitures, given by Statute, are to be en- "forced by civil suits. Fine and imprisonment are to be "inflicted as the result of a conviction on a criminal prosecu- "tion. Different methods are to be resorted to, to enforce the "different parts of what is one and the same punishment. "But, the fact that the two methods may be progressing "simultaneously, and one be completed before the other, or "that one may be fully completed before the other is com- "menced, cannot have the effect to annul the provision of law "in regard to the uncompleted part." The Court therefore concludes that the defendant is not twice in jeopardy, but is only being punished once. It does not seem to us that the above reasoning can be correct.

The proceeding to forfeit involves a trial, distinct from the trial on the indictment, a re-examination of the same facts and matters previously inquired into; a re-determination of the question whether the party has committed the offense, and whether he is guilty or innocent; which means that it may be determined in this second proceeding that he is not guilty, that

the offense charged has not been committed, and that he shall not be punished therefor.

What position would the Government and the defendant then be in if it were true that the fine, imprisonment, and forfeiture were all one punishment? Defendant, on his criminal trial under the indictment, has been found guilty of the offense which subjects him to fine and imprisonment; on the trial under the forfeiture proceedings he has been found not guilty of the offense, which releases him from the forfeiture. If the fine, imprisonment, and forfeiture, are all "one punishment" we would like to ask, under such circumstances, "which one?" If the Government cannot split that in two and say there are two punishments, if it must accept the statement in Re Lesznysky, that "the whole is one punishment, and that the whole cannot be satisfied by a part," we would like to know which judgment it could proceed to satisfy; that finding the defendant guilty, or that finding him innocent? For according to that decision the punishment is all one, and must be all one way or the other, while the judgments on which it is based may exactly contradict each other. How can one punishment be pronounced on two opposing verdicts, one of which says the punishment may be inflicted, the other that it may not be?

The Court proceeds upon the assumption that the two actions—the criminal case and the forfeiture proceeding—will both result in the same verdict, when the one punishment could be pronounced. But that does not follow by any means, since they are distinct actions, before distinct juries, each independently arriving at its verdict. And while they pass upon the same acts and facts, they may arrive at different conclusions.

The Court in In Re Leszynsky therefore concludes that the two proceedings do not place the offender twice in jeopardy.

"In jeopardy" means "in peril," "in danger."

When Young was placed on trial under the indictment he was not in jeopardy of having his property forfeited unless that forfeiture could have been included in the judgment in that case. If it could have been included, as Justice Bradley seems to intimate in Boyd vs. U. S., then the Government waived that forfeiture by not including it. (See Ex Parte Lange above.) If the forfeiture could not have been included in that judgment, b required a separate action to inflict it, as Judge Blatchford holds, then Young is now by this action being placed in jeopardy of suffering another, a new, additional and distinct punishment for the same offense, a punish-

ment he was not in jeopardy of, in danger of, in the first case. If this does not constitute placing him for the same offense *twice* in jeopardy, we cannot conceive any case where that plea could avail him. The purpose of the law evidently is to have a person tried for an offense, the punishment prescribed for that offense declared by the judgment in that case and inflicted, and have it done with (Ex Parte Lange above). There must be an end to litigation, and the Constitution says it comes when a man has been tried and convicted once. The law undoubtedly could provide that the forfeiture of the property should be included in the judgment recovered on that trial as well as any other penalties. Then the one judgment would settle the whole thing forever. But under the Government's contention in this case Congress can, if it only puts it in one section, prescribe a dozen punishments for one offense to be inflicted in a dozen different trials, any or all of them to be prosecuted at the option of the United States Attorney. All of them, he says, would then constitute but *one* punishment. If requiring a separate trial and a distinct proceeding in order to inflict a certain punishment does not constitute it a second, different, and new punishment, what could constitute a second punishment? One of the principal objections is that a man never would know when he had gotten through suffering punishments for his offense, as it would be discretionary with the United States Attorney to decide how many he would inflict, and when to inflict them.

The Leszynsky case endeavors to distinguish from U. S. vs. McKee above. Because in the McKee case the two punishments are prescribed for the same offense by different sections, it is argued they are in the alternative, and one satisfies the other, as though there was a disjunctive between the different sections; while if they were in the same section they would be cumulative and one punishment. This, although the Revised Statutes declare what laws are in force, and constitute one act. The fact that the statute states that certain acts constitute an offense, and prescribes the different punishments in two sections instead of one, certainly can make no difference if it is apparent that the sections are to be read together.

It will be observed that Judge Blatchford accepts the reasoning in U. S. vs. McKee as correct, and holds that where a person has been punished under one section he cannot afterwards be punished for the same offense under another section. While, as before stated, we can see no reason for this distinction, yet if it is correct we think our plea should be sustained.

for the indictment of Young was under Section 3451, and the forfeiture is sought, not under that section, but under sections 3257, 3281, 3305, 3453 and 3456 (See opinion of Judge Ross, 43 Fed. Rep., 846). In short, one of the questions with Judge Ross was whether the fact that the two proceedings were under *different* sections would not prevent the plea in bar being maintained.

In U. S. vs. Claflin (7 Otto 546), cited in the Leszynsky case, the Court, in what is probably dictum, holds practically that the forfeiture is in the nature of liquidated damages to indemnify the Government for the loss it has sustained by being defrauded of the import duties on the goods; while the fine and imprisonment constitute the punishment. Since the much later decision in Boyd vs. U. S. above, holding they are *both punishments*, the dictum of U. S. vs. Claflin is probably not of much weight. It could not avail the Government in this case, however, since the statute in relation to distilleries provides for the taxes, of which the Government has been defrauded, being assessed on the property on which they are a first lien, and being collected in a civil suit (Section 3213), as has been already done in this case. So the Government has been compensated for the actual damage it has sustained. It will be found that the old acts cited in the Leszynsky case where fine and imprisonment and also forfeiture are allowed, are smuggling cases where no provision was made for collecting the import tax by any separate proceeding, but the property is forfeited to indemnify the Government for the damage sustained.

In fact, we think it will be found in nearly all cases where the Court has held the action not to be a criminal one, that the Government by the action was seeking to reimburse itself for taxes or duties lost; so that the actions were not merely for the purpose of inflicting punishment, but also for the purpose of recovering money due.

Another case relied on by the Government is U. S. vs. Three Copper Stills. This is a case decided by District Judge Barr of Kentucky, in 1890. The opinion is based upon the declaration in The Palmyra, 12 Wheat, 14, that "the thing is here "primarily considered as the offender, or rather, the offense "is attached primarily to the thing." And the Court also says: "There is no case known to me which decides that this "constitutional provision (the jeopardy clause of Amendment "5 of the Constitution), includes a proceeding *in rem*, which "is a civil action, within its inhibition." We have seen that

the case of Boyd vs. U. S., decided much later than The Palmyra, holds the proceeding *in rem* is a criminal action, so far at least as a part of Amendment 5 is concerned; that it is a proceeding to punish the owner for an offense, and he is the real defendant. The Three Copper Stills decision, however, avoids directly passing on the question of twice in jeopardy, but holds the packages of liquor are forfeited because of their being in a place not allowed by law, and not for any offense of their owners; therefore it is not sought to forfeit them for the acts for which their owners were tried. The opposite is admitted to be the fact in the case at issue.

The Government also relied on the decision of the District Court of the U. S. Northern District of California in U. S. vs. Olsen. The Court in that case accepts the rule as laid down in U. S. vs. McKee, but holds that that rule does not apply in the Olsen case. It says: "Here (in U. S. vs. McKee) the same "party was being prosecuted in the two actions for the same "specific acts, and the issues were therefore identical. This "is not the case at bar." The Court also distinguishes from this case, U. S. vs. One Distillery.

People vs. Stevens relied on by the Government is a New York case decided in 1835. It arose under the New York Revised Statutes; Sec. 16 of a certain Chapter provided that all tavern-keepers who should sell liquor without a license should pay a penalty of $25, and Sec. 19 provided that this penalty should be recovered by the Overseers of the Poor; Sec. 25 of the Statutes provided that the same act should be a misdemeanor punishable by fine and imprisonment. Stevens having paid the penalty under Section 19, was indicted for the same offense under Sec. 25. According to the claim of the Government the punishments, being in different Sections, would not be one; and Stevens having suffered the full penalty under Sec. 19, could not suffer under Sec. 25. The Court held otherwise, however. The decision seems to us to be of little weight since it is in conflict with the United States authorities.

The Government's other point is, that the property became forfeited at the time the offense was committed, and title was immediately vested in it and has never been divested.

It seems to us this is begging the whole question. The Government, by reason of the fraud, acquires a right to have the property declared forfeited to it, which it must establish by proper proceedings. Suppose it never takes these proceedings at all. Could it be claimed that the title to the property was in the Government? And could not the Government waive its right by not bringing suit?

The question in U. S. vs. Stowell, and the other cases preceding it cited by the Government, was, whether innocent purchasers, after the fraud and before the judgment of forfeiture, were protected. And in order to avoid those conveyances, it was held that a judgment in the Government's favor in the forfeiture proceedings dates back to the time the offense was committed, and vests title in the Government as of that date, and avoids any subsequent conveyances by the parties. The title is established by the judgment, however, and if there is no judgment there is no title; and if the Government fails to obtain that judgment, either by failing to bring the suit or by an estoppel, or because it has elected to pursue another remedy, which the Constitution says is a bar, then title never is perfected in the Government but still remains in the parties. Until the proceeding *in rem* is completed by a judgment in its favor, it is still an open question whether any fraud has been committed, and the Government has no title. The burden of proof is still on the Government to prove it has any claim to the property.

The very latest decision does not declare that the unlawful act transfers the property or the title to the property at that time, but "the *right* to the property then vests in the United "States, although their *title* is not perfected until judicial con- "demnation; the forfeiture constitutes a statutory transfer "of the *right* to the United States at the time the offense is "committed, and the condemnation, when obtained, relates "back to that time, and avoids all intermediate sales and "alienations, even to purchases in good faith." (U. S. vs. Stowell, 133 U. S., 1.) It is evident that no title passes until a decision in the Government's favor in the forfeiture proceedings. The decision in the criminal case does not settle it, for the property could not be forfeited in that proceeding.

From an examination of the original acts it seems to us the original idea in passing laws prescribing fine and imprisonment and forfeiture of the goods was threefold. 1st: The idea that the goods themselves by some fiction of law were being punished for the offense by this forfeiture, and not the owner; as though the goods themselves could commit a crime. This idea Boyd vs. U. S. seems to us to effectually dispose of. 2nd: That the forfeiture was not a punishment for the offense, but was a proceeding by the Government to recover compensation for the damage suffered by it by the loss of taxes imposed; and the value of the goods was liquidated damages. This idea is also refuted by Boyd vs. U. S., but even if it were

true, it could not be urged in this case since the present law provides for the recovery of the damage suffered in a separate action, which course has already been pursued in this matter. 3rd: The idea that the perpetrator of the offense and the owner of the goods might be distinct, so that the punishment of the ostensible offender might be no punishment of the real offender who was the owner of the goods. With this idea in view, there was good reason why the punishments should not be in the alternative. This, however, will not avail the Government, as it is admitted the perpetrator of the offense who has been fined and imprisoned is, for the purposes of this case, the owner and claimant of the property it is sought to forfeit.

In the light of modern decisions, we do not see how, in any view of this forfeiture proceeding, it can be construed as anything but an action purely, simply and solely to inflict a second punishment on a party for an offense for which he has already been punished, and is placing him twice in jeopardy for the same offense.

In conclusion, we cannot do better than quote the language of Justice Bradley in Boyd vs. U. S. above, which is quoted and approved in 148 U. S., 325, and 149 U. S., 744, and is as follows: "Illegitimate and unconstitutional practices get their first "footing in that way, namely: by silent approaches and slight "deviation from legal modes of procedure. This can only be "obviated by adhering to the rule that constitutional pro- "visions for the security of person and property should be "liberally construed. A close and literal construction de- "prives them of half their efficacy and leads to gradual depre- "ciation of the right, as if it consisted more in sound than in "substance. It is the duty of Courts to be watchful for the "constitutional rights of the citizen, and against any stealthy "encroachments thereon. Their motto should be *obsta prin- "cipiis.* We have no doubt that the legislative body is actu- "ated by the same motives, but the vast accumulation of pub- "lic business brought before it sometimes prevents it, on a first "presentation, from noticing objections which become devel- "oped by time and the practical application of the objection- "able law."

Frederic W. Hall

Attorney for Claimants.

San Francisco, December 30, 1898.